MOHD JOHI SAID & ANOR

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NOS: P-05-34-2000 & P-05-35-2000]
25 OCTOBER 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in 4,829g of cannabis - Appeal against conviction - Whether trial judge erred in handling facts of case - Whether there was judicial appreciation of the evidence - Failure of trial judge to warn himself of dangers of convicting on contradicted evidence of agent provocateur - Whether rejection of defence's evidence proper - Whether defence's case judicially appreciated - Whether non-direction amounted to misdirection - Whether conviction unsafe*

EVIDENCE: *Judge - Failure of judicial appreciation - Appeal against conviction for trafficking in a dangerous drug - Whether trial judge erred in handling facts of case - Whether there was judicial appreciation of the evidence - Failure of trial judge to warn himself of dangers of convicting on contradicted evidence of agent provocateur - Whether rejection of defence's evidence proper - Whether defence's case judicially appreciated - Whether non-direction amounted to misdirection - Whether conviction unsafe*

EVIDENCE: *Agent provocateur - Credibility - Appeal against conviction for trafficking in a dangerous drug - Failure of trial judge to warn himself of dangers of convicting on contradicted evidence of agent provocateur - Whether there was judicial appreciation of the evidence - Whether there was non-direction amounting to misdirection - Whether conviction unsafe*

CRIMINAL PROCEDURE: *Appeal - Evidence - Failure of judicial appreciation - Appeal against conviction for trafficking in a dangerous drug - Whether trial judge erred in handling facts of case - Whether there was judicial appreciation of the evidence - Failure of trial judge to warn himself of dangers of convicting on contradicted evidence of agent provocateur - Whether rejection of defence's evidence proper - Whether defence's case judicially appreciated - Whether non-direction amounted to misdirection - Whether conviction unsafe*

Before the High Court, both the appellants herein, together with one Abdul Rahman Ab Shatar (DW1), were charged with trafficking in 4,829g of cannabis ('the drug') under s. 39B(2) of the Dangerous Drugs Act 1952 ('the DDA'). The case for the prosecution was centred on the evidence of an agent provocateur ('PW3'), who had testified that the negotiations for his purchase of the drug from the appellants were conducted as between himself and the 2nd appellant. PW3 also alleged that the 1st appellant was present at one of the negotiations. As it transpired, PW3 had arranged a meeting with the appellants at a particular place and time, with the police laying in wait thereat, and this had resulted in the arrests of both the appellants and DW1 at the scene. The case for the prosecution was that the drug was found and recovered from the front passenger seat of a motorcar ('the car') in which the 1st appellant and DW1 had driven to the scene.

On their part, the appellants denied that they had ever sold or arranged to sell any drugs to PW3; they claimed that they were introduced to PW3 with a view to being recruited as police informers. DW1 testified that after arriving at the scene, he had overheard someone saying "put the thing in the car". Both the 1st appellant and DW1 also testified that they did not see any bags in the front seats or on the floorboard of the car. It was the appellants' contention that the drug was planted in the car. At the close of the case for the prosecution, DW1 was acquitted but both the appellants were called upon to enter on their defence. After a trial, the learned judge found the appellants guilty and convicted and sentenced them to death.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The learned judge had to, but did not, address and resolve the critical issue as to whether this was a case of 'a trafficking' or of 'a plant'. As a result of this, the learned judge had erred in his handling of the facts of the case. Indeed, an error by a trial judge in the handling of the facts of a case is a ground for quashing the conviction. (p 395 c-d)

[2] The learned judge had also failed to 'judicially appreciate' the evidence of PW3. Despite the fact that PW3's testimony had been contradicted by other evidence (which suggested that he was not a credible, consistent witness), yet the learned judge did not approach the evidence with extreme caution and warn himself of the dangers of acting upon it. Indeed, the learned judge had applied the wrong test in considering PW3's evidence; his judgment was, therefore, fatally flawed on this ground. (pp 395 e-h & 396 a)

[3] The learned judge had rejected much of the appellants' evidence (from the dock) although such evidence was consistent with that of PW3 as led by the prosecution. This was a serious error; it fell far short of the proper approach that a judge should take when judicially appreciating evidence. (p 396 b-c)

[4] DW1's evidence that there was no bag in the car and that he had heard someone saying "put the thing in the car" was not given due consideration and accepted or rejected by the learned judge. The learned judge was duty bound to consider that part of the defence's case but he did not do so. In fact, he did nothing further than recite briefly the evidence of DW1 in his judgment. There was simply no judicial appreciation of the defence's case. This was a serious non-direction which amounted to misdirection. The appellants' convictions were, therefore, unsafe. (pp 396 d-g & 397 d)

[Appellants' convictions quashed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Di hadapan Mahkamah Tinggi, kedua-dua perayu di sini, bersama-sama dengan seorang Abdul Rahman Abdul Shatar (DW1), telah dituduh dengan kesalahan mengedar 4,829g dadah cannabis ('dadah') di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('DDA'). Kes pendakwaan adalah berkisar di sekitar keterangan seorang agent provocateur ('PW3'), yang memberi keterangan bahawa rundingan mengenai pembelian dadah olehnya berjalan di antara beliau dengan perayu kedua. PW3 juga mendakwa bahawa perayu pertama hadir dalam salah satu dari rundingan-rundingan tersebut. Sepertimana yang terjadi, PW3 telah mengatur suatu perjumpaan dengan perayu-perayu di suatu tempat dan masa, dengan pihak polis menunggu untuk memerangkap mereka, dan ini telah menyebabkan perayu-perayu serta DW1 ditangkap di situ. Kes pendakwaan adalah bahawa dadah telah dijumpai dan diperolehi dari tempat duduk penumpang hadapan sebuah kereta ('kereta') yang dipandu ke tempat kejadian oleh perayu pertama dan DW1.

Di pihak mereka, perayu-perayu menafikan bahawa mereka telah menjual ataupun mengurus untuk menjual apa-apa dadah kepada DW1; mereka mendakwa bahawa tujuan mereka diperkenalkan kepada PW3 adalah untuk mereka menjadi pemberi maklumat polis. DW1 menyatakan bahawa apabila beliau sampai ke tempat kejadian, beliau mendengar seseorang berkata "letakkan barang dalam kereta". Kedua-dua perayu pertama dan DW1 juga memberi keterangan bahawa mereka tidak nampak sebarang beg di kedua-dua

tempat duduk hadapan mahupun di atas lantai kereta. Menjadi hujah perayu-perayu bahawa dadah telah diletakkan oleh polis di dalam kereta. Di penutup kes pendakwaan, DW1 telah dibebaskan tetapi kedua-dua perayu dipanggil untuk membela diri. Selepas perbicaraan, yang arfi hakim mendapati kedua-dua mereka bersalah dan mensabit serta menjatuhkan hukuman mati ke atas mereka.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Yang arif hakim berkewajipan untuk mengupas dan menyelesaikan isu mengenai sama ada ini merupakan suatu 'kes pengedaran' ataupun 'kes memperdaya' tetapi telah gagal berbuat demikian. Disebabkan kegagalannya itu, yang arif hakim telah silap dalam pengendalian fakta-fakta kes. Tentunya, kesilapan hakim bicara dalam menangani fakta kes boleh menjadi alasan untuk membatalkan sabitan.

[2] Yang arif hakim juga gagal untuk 'menimbang secara kehakiman' keterangan PW3. Walaupun keterangan PW3 bercanggah dengan keterangan-keterangan lain (menggambarkan bahawa beliau bukan seorang saksi yang konsisten dan boleh dipercayai), yang arif hakim tidak mengendalikan keterangan tersebut dengan penuh berhati-hati dan mengingatkan dirinya akan bahaya bertindak atas keterangan sedemikian. Malah, yang arif hakim telah memakai ujian yang salah dalam menilai keterangan PW3; penghakiman beliau, dengan itu, adalah cacat secara yang memudaratkan.

[3] Yang arif hakim menolak sebahagian besar keterangan perayu-perayu (dari kandang) walaupun keterangan tersebut konsisten dengan keterangan PW3 yang dikemukakan oleh pendakwaan. Ini suatu kesilapan yang serius; ini bukanlah pendekatan yang harus diambil oleh seseorang hakim apabila menilai keterangan secara kehakiman.

[4] Keterangan DW1 bahawa tidak terdapat sebarang beg di dalam kereta dan bahawa beliau mendengar seseorang berkata "letakkan barang di dalam kereta" telah tidak diberi pertimbangan sewajarnya oleh yang arif hakim. Yang arif hakim berkewajipan untuk menimbang bahagian keterangan pembelaan yang tersebut ini tetapi telah gagal berbuat demikian. Beliau, malah, tidak berbuat apa-apa mengenainya selain dari mengulangi dengan rengkas akan keterangan DW1 dalam penghakimannya. Kes pembelaan langsung tidak diberikan pertimbangan olehnya. Ini adalah suatu ketiadaan arahan serius yang sampai ke tahap salah arahan. Pensabitan perayu-perayu, dengan itu, adalah tidak selamat.

Sabitan terhadap perayu-perayu dibatalkan.]

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balasingham v. PP [1959] MLJ 193 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(foll)***
Mohammad Husain v. Emperor AIR [1945] Nag 441 ***(refd)***
Zahari Yeop Baai v. PP [1980] 1 MLJ 160 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(2)

(Criminal Appeal No: P-05-34-2000)
For the appellant - Harpal Singh; M/s Harpal Singh & Co
For the respondent - Nurulhuda Nur'aini Mohd Noor

(Criminal Appeal No: P-05-35-2000)
For the appellant - G Ravishankar; M/s Harpal Singh & Co
For the respondent - Nurulhuda Nur'aini Mohd Noor

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-3-98]

Reported by Alex KC Lee

JUDGMENT

Gopal Sri Ram JCA:

Introduction

The appellants before us together with one Abdul Rahman bin Ab. Shatar were charged for trafficking in 4,829 grams of cannabis contrary to s. 39B(2) of the Dangerous Drugs Act 1952. The learned judge acquitted Abdul Rahman at the close of the prosecution case. There is no appeal by the Public Prosecutor against that order. The judge however called for the defence of the appellants. Each of them made a statement from the dock. Abdul Rahman then gave evidence for the defence as DW1. At the close of the whole case the learned judge found the case against the appellants proved. He convicted them and sentenced them to the mandatory death penalty. The appellants now appeal to us. We heard this appeal on 8 September 2004 and adjourned it for continued hearing yesterday. At the conclusion of arguments, we adjourned the appeal to today for our decision.

Facts

The facts here are fairly straightforward. The prosecution case, which is mainly based on the evidence of PW3, is that there was a sale of the drug in question by the appellants to PW3 who had acted throughout as agent provocateur. According to the story as told by PW3, on 18 October 1997, he proceeded to a stall in front of a sawmill at the Grik base camp. He met his informer there. The informer told him that there was a Malay who was trafficking in drugs and furnished PW3 with the background and identity of the person concerned. He was then introduced to a male Malay who called himself "Sham" who is Rohaisam bin Othman (the second appellant) before us. PW3 introduced himself as "Isa". Thereafter, according to PW3 negotiations were conducted between himself and the second appellant for the proposed sale of the drugs by the second appellant. It is also part of PW3's evidence that Mohd Johi bin Said (the first appellant) was present at one of the meetings that PW3 had with the second appellant concerning the sale of drugs.

PW3 also testified that a meeting was arranged at Bukit Mertajam on 14 November 1997 at 7.30pm, between himself and the appellants. The police planned an ambush at the scene. PW3 arrived at the scene at about 8pm. About an hour later the first appellant and Abdul Rahman arrived in a motor car No. PCN 6527. The second appellant had arrived earlier. According to the prosecution evidence, Abdul Rahman alighted from the car and stood near it. Thereafter, the trap set by the police was sprung and all three suspects were arrested. The prosecution case is that the drugs in question were found and recovered from the front passenger seat of the motor car No PCN 6527.

The appellants' case is quite different. According to both appellants, they were introduced to PW3 with a view to their being recruited as police informers. In their respective statements made from the dock, they denied that they had sold or agreed to sell any drugs to PW3. The first appellant denied that the drug in question had ever been in motor car No PCN 6527. His counsel put to PW5 (DSP Yusuh, the leader of the ambush party) during cross-examination that the drug had not been found in motor car No PCN 6527. The defence case as put to prosecution witnesses implied therefore that the drug had been planted in motor car No PCN 6527. Further, DW1 gave evidence that he had taken a lift from the second appellant to the scene of the ambush. While travelling he did not see any bag in the front passenger seat, on the floorboard or anywhere else inside the car. On arrival at the scene, DW1 went to ease himself. After that there was a commotion. He heard someone say: "Letak barang dalam kereta PCN". (Put the thing in car PCN"). He was then blindfolded, handcuffed and severely assaulted. We may add that from the

printed record it is fairly plain that DW1 was subjected to strenuous cross-examination which he withstood and emerged from the witness box with his credibility unscathed.

The Learned Judge's Approach

The learned judge therefore had two versions before him. First, the prosecution's version that there had been a sale or at least an attempted sale of the drugs in question. Next, the defence version that there was no sale but that the drugs had been planted in motor car No PCN 6527. The question that the learned judge had therefore to resolve was whether this was a case of trafficking or "a plant". Unfortunately, the learned judge did not anywhere in his written grounds of judgment address his mind to this critical issue. In our respectful view, the learned judge therefore erred in his handling of the facts. It is settled law that an error by a trial judge in his handling of the facts is a ground for quashing a conviction. See, *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469; *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705. Accordingly this is a case warranting appellate interference.

There are three further criticisms that were levelled by learned counsel for the appellants against the learned trial judge's approach to the case. The first relates to the failure on the part of the learned judge to judicially appreciate the evidence of PW3. Our attention has been drawn to those parts of the PW3's evidence where he was confronted and contradicted by other material. In his evidence in chief, PW3 asserted that he had given evidence in other cases and that his evidence in those cases had been accepted and acted upon by other courts. Under cross-examination, counsel confronted PW3 with the records in a case from Taiping where the court in its judgment had unqualifiedly rejected his evidence on the ground that he was not a credible witness and that his evidence was inconsistent.

Now, this is a serious matter. The learned trial judge was being made aware that he had before him a witness whose evidence may be tainted. It was therefore his duty to approach the evidence of PW3 with caution and to warn himself, of the danger of acting on his evidence. It was of course open to the learned judge, after warning himself thus and for good reasons to have found the witness credible. He could then have acted on the witness' evidence and no serious complaint could have been made about it. However, nowhere in his judgment did the learned trial judge adopt such an approach. We therefore find merit in counsel's submission that the learned judge applied the

wrong test when considering PW3's evidence and that his judgment is therefore fatally flawed on this ground. We may also add that the learned judge turned an indulgent eye upon PW3's evidence when he should have treated it with extreme caution.

The second complaint advanced by learned counsel relates to the learned judge's handling of the defence evidence. In his judgment the learned judge rejected the first appellant's statement from the dock on the ground that no reason had been given by that appellant for telephoning PW3. However, even a cursory reading of the first appellant's statement makes it clear that he did give a reason for calling PW3 on 13 November 1997. He said that he was instructed by PW3 to do so about 3 or 4 weeks after their first meeting. And if you look at PW3's evidence, that is precisely what that witness says. The learned judge therefore rejected so much of the defence evidence that was consistent with that led by the prosecution. This is a serious error and falls far short of the proper approach that a judge should take when judicially appreciating evidence.

The third ground of complaint relates to the appreciation of DW1's evidence. As already stated, DW1's evidence was that there had been no bag or anything else in the interior of motor car No PCN 6257. In short, he was saying that the drug in question was not where it was found later by the witnesses for the prosecution. Additionally, this witness had heard someone say that "put the thing in car PCN". On these facts, it was essential that the evidence of DW1 be given due consideration and either accepted or rejected. Unfortunately, the learned judge did nothing further than recite in brief the evidence of this witness in his judgment. This is a serious non-direction which amounts to a misdirection by the learned judge. And the learned deputy before us had perforce conceded the point.

We have here a case where a serious defence, supported by credible evidence was presented to the court. It was the bounden duty of the learned trial judge to consider that defence. This was not done. There was simply no judicial appreciation of the defence case. This is accordingly a case of non- direction by the learned judge unto himself. And we find it sufficient in this context to quote from two authorities merely to remind ourselves of the importance of the point that is being made. In *Balasingham v. Public Prosecutor* [1959] MLJ 193, Ismail Khan J (later CJ Borneo) said:

> There was therefore a direct conflict of evidence and a serious defence cannot be summarily dismissed as an improbable story without adequate reasons for such a conclusion.

In *Gooi Loo Seng v. PP* [1993] 3 CLJ 1, Edgar Joseph Jr SCJ when delivering the judgment of the Supreme Court said:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that the non-direction amounts to a misdirection, for, in the words of Pickford J in *R v. Bundy* (5 Cr App R 270):
>
> > the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See, *Mohammad Husain v. Emperor* AIR [1945] Nag 441; *Zahari bin Yeop Baai v. PP* [1980] 1 MLJ 160. That question, on the present facts, must receive a negative response.

The Result

For the reasons already given, these appeals must be allowed. The convictions of the appellants are quashed. They shall forthwith be set at liberty.